Supreme Court of the United States.

No. 178.—October Term, 1906.

John W. Duke, Mayor, and William T. Walker et al., Councilmen of the City of Guthrie, Plaintiffs in Error,
vs.
C. W. Turner and James A. Kirkwood.

In error to the Supreme Court of the Territory of Oklahoma.

[February 25, 1907.]

Mr. Justice Day delivered the opinion of the Court.

The original action was a proceeding in mandamus commenced in the District Court of Logan County, Oklahoma Territory, July 23, 1903, by Turner and Kirkwood against the mayor and councilmen of the city of Guthrie. The petitioners obtained a writ of mandamus in the District Court to compel the city officials, for the payment of certain warrants, to levy a tax upon the property of persons residing in the territory covered by various former "provisional governments," and known as Guthrie proper, East Guthrie, West Guthrie and Capitol Hill, now included in the city of Guthrie.

These warrants were issued in pursuance of a special act of the Territorial legislature, approved December 25, 1890. 1 Wilson's Dig. 260, 261. This act was the subject of consideration in this court, its validity was sustained and its history will be found in *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528. The act is set forth in the margin of the report of that case at p. 530. The warrants sued upon are 17 in number, all bearing the date of July 1, 1893, and maturing in various years, from July 1, 1894, to July 1, 1898, inclusive. These warrants are in the following form:

"Warrant of the City of Guthrie, Oklahoma Territory.

$554.15. No. 6.

Treasurer of the City of Guthrie:

One year after date pay to the order of Harper S. Cunningham, receiver National Bank, Guthrie, the sum of five hundred and fifty-four and 15.100 dollars with interest thereon at the rate of six per centum per annum, from June 3, 1891, from any moneys which shall arise from special levy for the payment of city warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, upon the subdivision of Guthrie known as East Guthrie.

By the order of the City Council, July 1, 1893.

A. M. McElhinney, *Mayor.*

Attest: E. G. Milliken, *City Clerk.*"

The Supreme Court of the Territory preceded its opinion with the following statement:

"This is the third time that these warrants have been brought before this court. W. H. Gray, receiver of the National Bank of Guthrie, and successor to Harper S. Cunningham, on the 7th day of September, 1895, commenced a mandamus proceeding, identical with this, in the District Court of Logan County, for the purpose of compelling the then mayor and councilmen of the city of Guthrie to levy a tax to provide a fund for the payments of certain warrants; the district court allowed the writ, but the case was appealed to this court, and on the twelfth day of February, 1897, was reversed. [5 Okla. 188.] After this reversal nothing whatever was done by the holder of these warrants in the way of taking any steps towards collecting them for more than four years thereafter. But after the decision in the case of the *Guthrie National Bank* v. *The City of Guthrie* was rendered in the Supreme Court of the United States, [173 U. S. 528,] the holders of these warrants who had lain dormant during these years made another move. The old case of *Gray* v. *Martin and Spencer*, after it had been reversed and remanded, had been dropped from the docket, and on the 28th day of June, 1901, Turner and Kirkwood filed their motion as the successors in interest of Gray, to have the case redocketed, and also filed on the same day an application to have the case revived in their names, as the successors in interest of Gray, and on the same day they filed their motion to dismiss said action, which motion was sustained, and the case dismissed. Shortly after the dismissal of the original mandamus case Turner and Kirkwood brought suit against the city of Guthrie upon these same warrants, wherein a judgment against the city for the amount of the warrants was prayed for; they failed in this suit in the District Court and appealed to the Supreme Court, where the judgment of the lower court was affirmed. [13 Okla. 26.]

"On the twenty-third day of July, 1903, after the final decision in this court in the case of *Turner and Kirkwood* v. *The City of Guthrie*, this mandamus proceeding was commenced against the mayor and councilmen, the same being in all respects similar to and identical with the original mandamus proceeding brought by W. H. Gray, receiver, upon the same warrants in 1895. The return and answer to the alternative writ set forth the same defense as was alleged in the return to the proceedings brought by Gray, receiver, and also alleges the bar to the action of the statute of limitations. Trial was had before the court, wherein it was agreed that the allegations set forth in the fourth answer or return of the defendants to the alternative writ are true, and which show the facts substantially as above set forth. Thereupon the court rendered judgment for the plaintiffs below, and allowed a peremptory writ of mandamus against plaintiffs in error, from which judgment and final order the plaintiffs in error appeal to this court."

The Supreme Court of the Territory affirmed the judgment of the District Court upon the ground that the statute of limitations, which is also the defense made in the case upon which the decision of the appeal to this court turns, did not begin to run in favor of the municipal corporation

upon the obligation evidenced by the warrants, until the municipality had provided funds by which payment could be made.

The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in mandamus as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.

Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases *pro* and *con* are collected in a note to section 30*b*, High Extraordinary Legal Remedies, third ed.

The question is not a new one in this court; it was under consideration in *Chapman* v. *The County of Douglas*, 107 U. S. 348. That case was a bill in equity filed September 10, 1877, to compel the county of Douglas to surrender possession of two certain tracts of land to which the county had acquired title through deed made by Chapman, March 5, 1859, or in case the county elected to retain and hold the land that it be compelled to pay the reasonable price and value thereof to the complainant. The land had been conveyed for a "poor farm." The county made a payment on the land and gave its notes, secured by mortgage, payable in one, two, three and four years. Afterwards the Supreme Court of the State decided that by the purchase of lands for such a purpose a county could not be bound to pay the purchase money at any specified time or to secure it by mortgage upon the land, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. The notes remaining unpaid, the bill was filed in equity for the purpose above stated. In considering the nature of the relief and the applicability of the statute of limitations Mr. Justice Matthews, speaking for the court (p. 355) said:

"And if in such cases a proceeding in mandamus should be considered more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the statute of limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by mandamus must depend, in a great measure, on the character and circumstances of the particular case. *Chinn* v. *Trustees*, 32 Ohio St. 236; Moses on Mandamus, 190. There is no statute of limitations in Nebraska applicable to that proceeding."

It will be observed that the learned justice refers in the citation just given to *Chinn* v. *Trustees*, 32 Ohio St. 236, and Moses on Mandamus,

190. In that treatise the author gives his preference for the English rule, that the party should suffer no unreasonable delay in the opinon and discretion of the court, as more just and equitable than the rule countenanced by some of the American cases.

The case of *Chinn* v. *Trustees*, 32 Ohio St. 236, holds that under the Ohio code there is no strict limitation as to the time wherein a writ of mandamus may be obtained, and the case is directly in point, owing to the similarity of the codes of Ohio and Oklahoma.

The statute of limitation relied upon in the case at bar is the three years' limitation, contained in second paragraph, section 18, Oklahoma Code, 2 Wilson's Rev. Stats. 973, 975, as to statutory liabilities, and section 23, regulating the time for the beginning of a new action to one year after reversal or failure of a former action. These sections in article 3, "Time of Commencing Civil Actions," are as follows:

"SEC. 18. Civil actions, other than the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years, an action upon any contract, agreement or promise in writing.

"Second. Within three years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

* * * * * *

"SEC. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

The limitation to three years, said to be applicable here, is upon an action created by statute other than forfeiture or penalty, but this language is in a section limiting *civil actions* other than for the recovery of real property, and the language used in section 23 has reference to actions of like character.

The proceeding in mandamus is regulated in article 33, Oklahoma Code, 2 Wilson Revised Statutes, 1130. That the proceeding is not regarded as a civil action is shown in section 694, Code, 2 Wilson, 1131, which provides that pleadings are to be construed and may be amended in the same manner "as pleadings in a civil action," and issues joined, tried, and the proceedings had, "in the same manner as in a civil action." The Oklahoma Code (§ 687) also declares that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law.

In *Chinn* v. *Trustees, ub. sup.*, Judge Scott, delivering the opinion of the Ohio Supreme Court, said:

"The code of civil procedure limits the time within which an action can be brought 'upon a liability created by statute, other than a forfeiture or penalty' to six years. (Sec. 14.) This provision is found in title 2 of the code, the object of which is to define and prescribe 'the time of commencing civil actions.' The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law, or suits in equity. (Sec. 3.) By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded as an action at law, or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has any adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action."

This language is no less applicable to the Oklahoma code. The proceeding in mandamus is not a civil action, and therefore not within the terms of the statute of limitations.

Following, then, the rule recognized and approved in *Chapman* v. *County of Douglas, supra*, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?

We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan County, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the Supreme Court of the Territory, (5 Okla. 188,) and was remanded and refiled in the District Court, April 7, 1897.

The validity of the act was in controversy in the case of *Guthrie National Bank* v. *Guthrie*, and sustained in this court, April 3, 1899, (173 U. S. 528,) reversing the Supreme Court of the Territory.

On the twenty-eighth day of June, 1901, Turner and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the District Court, and on appeal to the Supreme Court, that court holding that the remedy, if any, was by mandamus. (13 Okla. 26.) On the 23d day of July, 1903, this mandamus proceeding was begun.

These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that

the municipal corporation has been in anywise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of these warrants by various holders in different courts without beneficial results until the present action.

While we do not put our decision upon the same grounds as the Supreme Court of the Territory, we think its conclusion was right, and its judgment will be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.